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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

No. 15

EVANDER FORD, ET AL.,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for the Writ of Certiorari.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,
Supreme Court Building,
Nashville, Tennessee,
WALKER T. TIPTON,
Assistant Attorney General,
State of Tennessee,
Supreme Court Building,
Nashville, Tennessee,
Attorneys for Respondent.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 397.

EVANDER FORD, ET AL.,
Petitioner,

v.

STATE OF TENNESSEE,
Respondent.

BRIEF

In Opposition to the Petition for the Writ of Certiorari.

The Respondent, State of Tennessee, for its statement in opposition to the petition for the writ of certiorari respectfully shows to the Court as follows:

OPINION BELOW.

Petitioners appealed to the Supreme Court of Tennessee from a conviction of willfully disturbing a religious assembly (Section 39-1204, Tennessee Code Annotated) ren-

dered against them in the Criminal Court of Shelby County, Tennessee. After hearing argument the Supreme Court unanimously affirmed the judgment of the lower court. The opinion of the Supreme Court of the State of Tennessee is reported in **355 S. W. 2d 102**, rehearing denied **356 S. W. 2d 726**.

JURISDICTION.

Jurisdiction is sought under 28 U. S. C. A., Section 1257 (3).

QUESTIONS PRESENTED.

1. Whether the conviction of the petitioners is so lacking in evidentiary support that it amounts to denial of due process of law under the Fourteenth Amendment to the Constitution of the United States.

2. Does the Constitution of the United States grant to the petitioners immunity from the legal consequences of their acts which are in violation of a valid criminal statute.

3. Whether conviction of the petitioner, Katie Jean Robertson, was affirmed on the basis of adequate non-federal grounds.

STATEMENT OF THE CASE.

On August 30, 1960 the Assembly of God Church in the City of Memphis had leased the Memphis Open Air Theater, a publicly owned facility, for the purpose of conducting a youth rally (Tr. pp. 70, 71). The meeting had as its purpose the inspiring of those who would attend into a "decision for Christ" (Tr. p. 72).

The meeting commenced at approximately 7:30 o'clock P. M., at which time there were several hundred persons in attendance. After the meeting had been under way for approximately fifteen minutes a group of fourteen or fifteen Negro youths, of which the petitioners were a part, appeared at one of the entrances (Tr. p. 99). The usher stationed at this entrance courteously approached the petitioners and told them it would be better if they did not come in. When the petitioners refused to leave, the usher, attempting to avoid difficulty, offered them seats where the entire group could be seated. The petitioners refused this tender by the usher and the petitioner Ford, the apparent leader of the group, at this time commanded the group to scatter out (Tr. p. 91).

When this command was given the usher asked the petitioners to please be seated, but the petitioners nevertheless pushed past the usher and simultaneously dispersed themselves throughout the congregation stepping over those worshippers already seated in order to take seats at the center of the rows (Tr. p. 92). Even though there were available seats at the ends of the rows, the petitioners undertook to simultaneously take different seats in the center of different rows and as they moved through the rows they caused those people who were already seated to move over and slide away in order to allow them to enter. This sudden invasion of the meeting and

the dispersing of themselves throughout the congregation, coupled with the movement which necessarily followed their action caused a general undercurrent to go up throughout the congregation, thus completely disrupting the services (Tr. p. 101).

At this point Reverend Scruggs, the official in charge of the meeting, decided to call the police because these petitioners were disrupting his service. Shortly after being called by Reverend Scruggs the police arrived at the amphitheater. The police then placed the petitioners under arrest and they were conducted out of the theater in an orderly manner.

The petitioners were jointly indicted for violation of Section 39-1204, Tennessee Code Annotated (wilfully disturbing a religious assembly). All of the petitioners except the petitioner Robertson were jointly put to trial before a judge and jury and were found guilty as charged in the indictment and sentenced to serve sixty days in the County Workhouse, plus a fine of $200.00. The petitioner Robertson did not appear at the time of this trial and, therefore, was tried separately at a later date wherein she was convicted of the same offense and sentenced to serve sixty days in the County Workhouse, along with a fine of $175.00.

Each petitioner appealed their conviction to the Supreme Court of Tennessee. Prior to the hearing of the cause the Supreme Court of Tennessee granted a motion on behalf of the petitioners allowing the cases to be jointly heard upon appeal and allowing the petitioner Robertson to adopt the brief and argument of the other petitioners. The Supreme Court of Tennessee, after hearing argument and considering the case, affirmed the conviction as to all the petitioners but in so doing noted that the bill of exceptions in the case of Katie Jean Robertson

had not been filed in the time allowed by law, and that under the State practice it became no part of the record in her case and could not be looked to for any purpose, and that the decision as to her was affirmed upon that basis. **355 S. W. 2d 102.**

Each Petitioner in due course filed a petition to rehear which was denied by the Court. **356 S. W. 2d 726.**

ARGUMENT.

The conviction of the petitioners was based upon evidence of their guilt and does not amount to a denial of due process of law.

At the outset it must be pointed out that the petitioner Robertson was tried separately from the remainder of the petitioners even though they were jointly indicted. Therefore, there is before the Court upon this petition two separate and distinct proceedings but the petitioners have undertaken to use the evidence interchangeably. Clearly each case must stand or fall upon its own record.

It must be noted that in the petitioner Robertson's case the Supreme Court of Tennessee held that the bill of exceptions in her case was not filed within the time prescribed by State law, and under the State appellate procedure that bill of exceptions did not become part of the record and could not be looked to for any purposes. The State's highest court affirmed her conviction because there was nothing before them from which they could determine the questions presented. (Such is the uniform practice under Tennessee procedure which is fully discussed in part III of this reply.) Thus, the opinion of the Supreme Court of Tennessee in this cause is not based upon any portion of the testimony adduced at the trial of Katie Jean Robertson, but rather its opinion is based upon the evidence developed at the trial of the remainder of the petitioners which is contained in the first 128 pages of the record. Therefore, the consideration of this petition must be in the light of the fact that only the first 128 pages of the record formed a basis of the State Court's opinion. Now to the merits.

The petition asserts that the record before the Court is comparable to the record which confronted this Court in

the case of **Thompson v. City of Louisville, 362 U. S. 199**, in that it is alleged that the conviction of the petitioners for a violation of Section 39-1201, Tennessee Code Annotated, is so devoid of evidence of their guilt as to amount to a denial of due process of law. However, the respondent must respectfully take issue with this contention.

It is well settled that when such an attack is made upon a State conviction the Supreme Court of the United States does not determine whether the evidence is sufficient to convict, but views the record only for the purpose of establishing whether there was any evidence of a violation of the particular criminal statute involved. **Thompson v. City of Louisville**, *supra*; **Garner v. Louisiana, 368 U. S. 157.** In order to determine whether there was any evidence of guilt it must first be determined what conduct is prescribed by the statute in question and the State Court's construction as to the type of conduct prescribed thereby is binding here. **Garner v. Louisiana**, *supra*; **Williams v. Oklahoma, 358 U. S. 576.**

The portions of the State statute pertinent to our discussion here reads as follows:

> "If any person willfully disturb or disquiet any assemblage of persons met for religious worship, . . . by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of meeting, he shall be fined not less than twenty dollars ($20.00) nor more than two hundred dollars ($200), and may also be imprisoned not exceeding six (6) months in the county jail."

The State Supreme Court in the case at bar construed this statute, thus defining the scope and the intent of the statute. That Court specifically found that the statute is not a breach of the peace statute "but rather it is a statute which is designed to protect to the citizens of [that

State the right to worship their God according to the dictates of their conscious without interruption." The State Court further held that the statute made it unlawful for anyone, by the use of any act, to willfully disturb a religious assembly and that such assembly was disturbed so long as the particular act attracted the attention of any part or parts of the assembly.

The record quite clearly shows that the Assembly of God Church of the City of Memphis was conducting a religious rally in a municipally owned amphitheater and that the obvious purpose of this meeting was to attract converts to their cause. After this meeting had been under way for approximately fifteen to twenty minutes the petitioners, a group of Negro youths, appeared upon the scene. The petitioners were met by an usher who courteously asked them not to remain, but the petitioners refused his request and the usher at that time tendered them seats where they could have been seated in a group. Instead of taking these seats the petitioner Ford commanded the group to scatter out. The record quite clearly indicates that when this command was given the usher asked the petitioners to please be seated but they, nevertheless, pushed past him, breaking into groups of two and simultaneously dispersed themselves throughout the audience. It is evident from the record that there were seats available at the ends of the rows where these petitioners could have been seated. However, each group took a different row throughout the congregation and proceeded to step over the worshippers already seated and take seats in the center of the rows. As the rows of this amphitheater are close together, when the petitioners moved into the rows the people who were already seated had to move and shuffle about to let them in. This commotion that was triggered by the petitioners' conduct went up throughout the audience instantaneously and caused a complete disruption of the services.

Unquestionably under these facts herein set out the acts of these petitioners unduly attracted the attention of the congregation and that is all that is necessary to constitute a disturbance under the State Court's interpretation of this Statute.

The Tennessee Supreme Court pointed out that the true gravamen of the offense is the willfulness of the act. (See opinion of the Supreme Court on Petition to Rehear in the case of **Ford et al. v. State**, ...Tenn....., **356 S. W. 2d 726**).

Under the State Court's prior decisions the term willful has been construed to mean intentional or by design. **Ryall v. State, 204 Tenn. 422.** Therefore, the essential ingredient of this offense is the intent or design that motivates the perpetrator of the act which creates the disturbance.

The petition contends that there is no evidence of the intent of the petitioners. Very seldom, if ever, in a criminal proceeding is there available to the Court direct proof of the intent that motivates an accused to commit a particular act. Generally, the intent necessary to be proven must be inferred from the acts of the parties and the attending circumstances of the case.

Looking to the evidence in the record that depicts the acts of the petitioners on this occasion, it is apparent that it warrants an inference of the petitioners' unlawful intent. The act of the petitioner Ford in commanding his group to "scatter out", coupled with the precise manner in which his command was executed, is clearly indicative of advance planning. The simultaneous dispersement of these petitioners in groups of two throughout the congregation and stepping over the worshipners already seated in order to seat themselves in the center of the rows when seats were available at the ends could serve

no purpose other than to disturb the worshippers. There was no necessity for these petitioners to simultaneously move to the center of the rows in the light of the available seats at the end of the rows unless their intent was to disturb those already seated. This conduct is so opposed to the accepted demeanor of religious assemblies that to infer that the petitioners' intent was other than to disturb this meeting would be a stultification.

This Court has held that conduct which forms a basis of inference is evidence. **United States ex rel. Bilokumisky v. Tod, 263 U. S. 149.** Therefore, since the record reveals conduct upon the part of the petitioners which forms a valid basis for the inference of their guilt under this statute, there is some evidence which supports their conviction and in view of this there is no denial of due process of law. **United States ex rel. Vajtauer v. The Commissioner of Immigration at New York, 273 U. S. 103.**

The Constitution of the United States does not grant to the petitioners the right to violate a valid criminal statute.

Part II of the petitioners' argument calls to mind the Court's admonition "that the burden of showing essential unfairness be sustained by him who seeks to have the results set aside and that it be sustained not as a matter of speculation but as a demonstrable reality." **Buchalter v. People of New York, 319 U. S. 427.**

In considering this portion of the argument in behalf of the petitioners it is first necessary to determine what this case is and what it is not. First, the case is an action under a valid criminal statute which prohibits the willful disturbing of a religious assembly and the only true question before the Court is whether the record is devoid of evidence of its violation. Second, the case at hand does not involve a segregation statute or its enforcement. The petitioners have undertaken to inject segregation

into this case by asserting that the basis of the conviction was the petitioners "mere presence as negroes in a white assembly was in itself a disturbance". The Supreme Court of the State of Tennessee made no such holding but based its opinion upon the conduct of the petitioners only. In actuality the petitioners by raising this question seek to entice the Court to weigh the sufficiency of the evidence which it will not do. **Thompson v. City of Louisville** *supra*.

But even so the constitutional theory which the petitioners press upon the Court in this part of their petition, ingenuous as it may be, is wholly fallacious. If the respondent correctly understands the petitioners' argument, it is their insistence that even though the statute is valid and there is evidence in the record upon which this conviction may be rested, the State is without power to enforce the same against them. If this argument is extended to its logical end the petitioners, under these circumstances, could commit any act of violence, even including murder, and the State would be helpless to inflict any punishment upon them. This we obviously cannot be for if the petitioners' contention be correct a State of anarchy would reign.

It is true the Constitution affords protection to the exercise of those rights granted thereunder but only to a point. **Cantwell v. Connecticut, 310 U. S. 296; Beauharnais v. The People of the State of Illinois, 343 U. S 250.** The line of demarcation which severs the constitutional protection from the exercise of those rights is the public welfare, the security of which is entrusted to the policy power of the State. **Cantwell v. Connecticut,** *supra*. As noted before, the petitioners do not attack the validity of the statute and unquestionably it is a permissive exercise of the police power of the State. Thus, are not the acts in violation of that statute beyond the protection

of the Constitution? This Court gave a very succinct answer to the foregoing inquiry in the case of **Chaplinskey v. State of New Hampshire, 315 U. S. 568;** when it said:

> "[E]ven though the acts of the appellant which preceded the incident could be viewed as . . . entitled to the protection of the Fourteenth Amendment they would not cloak him with immunity from the legal consequences for concomitant acts committed in violation of a valid criminal statute" (315 U. S. 571).

The opinion of the State Court insofar as it applies to the Petitioner Katie Jean Robertson rests upon adequate and independent non-federal grounds.

In consideration of the foregoing proposition it is well settled that the Supreme Court of the United States will not review the judgment of a State Court where such judgment is based upon adequate state grounds. **Black v. Cutters Laboratories, 351 U. S. 292; Durley v. Mayo, 351 U. S. 277.**

The Supreme Court of the United States will not disturb the decision of the State's highest court when such decision is based upon adequate non-federal grounds even though a Federal question may be involved. **Dixon v. Duffy, 344 U. S. 143; Woods v. Nurstheiner, 328 U. S. 211; Phyle v. Duffy, 334 U. S. 431.**

Further, it is well settled that the Supreme Court of the United States will not take jurisdiction to review a final decision of a State Court unless it explicitly appears from the record that a Federal question was presented to the highest court of the State and it was necessary to decide the Federal question in making its determination of the cause. **Lynch v. New York, 293 U. S. 52; Durley v. Mayo,** *supra.*

It becomes apparent from reading the Petition for Certiorari that the record before the Court contains what purports to be a transcript of the evidence adduced at the trial of the petitioner Katie Jean Robertson who was tried separately from the remainder of the petitioners. However, the Supreme Court of Tennessee specifically held that the bill of exceptions (the transcript of the testimony) in the petitioner Robertson's case was not filed within the time prescribed by law and, therefore, became no part of the record in her case. **Ford, et al. v. State, ... Tenn. ..., 355 S. W. 2d 102.** This being true it becomes obvious that the certification of the purported transcript of the evidence as part of the record in her case was erroneous.

The Tennessee Supreme Court based its decision as to the petitioner Robertson upon the State's procedural law and, therefore, it is necessary here to note that appellate review of the criminal conviction is not a necessary element of due process and if a State sees fit to grant such review it may place upon the appeal such limitations and conditions as it sees fit. **McKane v. Druston, 153 U. S 684; Carter v. The People of the State of Illinois, 329 U. S. 173.**

Under Tennessee practice there is no method to bring the evidence heard in the trial court before an appellate court except by way of a bill of exceptions. **Union Bank v. Lowe, 19 Tenn. 225.**

The State's procedural law requires that one who is seeking appellate review must file his bill of exceptions within the specified period of time set forth in **Section 27-111, Tennessee Code Annotated,** which reads as follows:

> "In all cases tried in the circuit, criminal, county, chancery, or any other court of record, either party may file a bill of exceptions or wayside bill of exceptions either within or after the expiration of the

term without any special order of court, provided the bill of exceptions or wayside bill of exceptions is approved by the court and filed within thirty (30) days from the entry of the order or action of the court which occasioned the filing of said bills of exceptions. The judge or chancellor may within the aforesaid thirty (30) day period, either within or after the expiration of the term, extend the time for filing said bills of exceptions for not exceeding an additional sixty (60) days. The maximum period of ninety (90) days shall be computed, in case of a bill of exceptions, from the date of final judgment, and in the case of a wayside bill of exceptions, from the date of the action, which occasioned the taking of such wayside bill of exceptions. The period of pendency of any motion or other matter, having the effect of suspending such final judgment or action, shall be excluded in the computation of the period."

The Supreme Court of Tennessee has held that a bill of exceptions must be filed within the time provided by law in order for it to become part of the record. **Scopes v. State**, 152 Tenn. 424; **Suggs v. State**, 195 Tenn. 170. Likewise, the Tennessee high court has ruled that a bill of exceptions which is not timely filed may not be looked to for any purpose and the Court may not go beyond the record to determine the merits of a case on appeal. **O'Brien v. State**, 193 Tenn. 361; **Suggs v. State**, supra; **State ex rel. Tines v. Bomar**, 205 Tenn. 527.

In the case of the petitioner Robertson the Tennessee Supreme Court specifically found that the bill of exceptions had not been filed within the time prescribed by law and that it formed no part of the record before it. **Ford et al. v. State**, ___ Tenn. ___, 355 S. W. 2d 102, 103. All the points relied upon by the petitioner Robertson turned upon matters of fact which could only be brought before the Court in the form of a bill of exceptions. However,

due to this Petitioner's dilatoriness no bill of exceptions was provided as shown above and the State Court could not go beyond the record and determine the merits of the appeal. **Suggs v. State**, supra. Thus, the State Court rested its decision as to the petitioner Robertson upon adequate non-federal grounds.

CONCLUSION

It is the most respectful insistence of the respondent that for the foregoing reasons the decision of the Supreme Court of Tennessee in affirming the conviction of the petitioners should in all things be affirmed by this Honorable Court, and the application for writ of certiorari be accordingly denied.

Respectfully submitted:

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

WALKER T. TIPTON,
Assistant Attorney General,
State of Tennessee,
Attorneys for Respondent.

Certificate of Service

I, Walker T. Tipton, Assistant Attorney General of the State of Tennessee, one of the attorneys for the respondent and a member of the bar of the Supreme Court of the United States, hereby certify that on the ____ day of October, 1962, I served copies of the within brief to the

respondent on Evanzler Ford, Jr., Alfred O'Neil Gross, James Harrington Smith, Ernestine Hill, Johnnie Mae Rogers, Charles Edward Patterson, Edgar Lee James and Katie Jean Robertson, Petitioners, by mailing said copies in duly addressed envelopes, postage duly paid, to the counsel of record, namely, Jack Greenberg, James M. Nabrit, III, and Derrick A. Bell, Jr., Suite 1790, 10 Columbus Circle, New York 19, New York.

Walker T. Tipton,
Assistant Attorney General,
State of Tennessee.